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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-6108

EMMA ARMOUR, et al.,

Plaintiffs-Appellants,

v.

JACK P. NIX, et al.,

Defendants-Appellees.

On Appeal From
the United States District Court
For the Northern District of Georgia

JURISDICTIONAL STATEMENT

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PRELIMINARY STATEMENT

This case is an interdistrict school desegregation case brought in forma pauperis by black parents whose children attend school in the nearly 90% black Atlanta, Georgia, school district.

Shortly after this case was filed in 1972, defendants moved for the convening of a three-judge district court. Plaintiffs objected on the grounds that the only state laws whose constitutionality was drawn into question either required segregation and prohibited desegregation or interfered with the remedy sought by plaintiffs--issues which do not require the convening of a three-judge district court. A three-judge district court nonetheless was convened, and that court on August 24, 1973, directed that the case proceed both as a single-judge and as a three-judge court case. On September 30, 1977, the court denied plaintiffs' motion to dissolve the three-judge court, and again directed that the case proceed as both a single-judge and three-judge court case.

On September 24, 1979, two identical Final Orders dismissing plaintiffs' claims were entered in this case: one by the single-judge district court and the other by the three-judge district court. On the same date a Final Judgment was entered by the Clerk.

Because of the two separate Final Orders filed by the single-judge and three-judge courts below, plainfiffs have had to pursue simultaneously two appeals from what in effect is the same judgment. Plaintiffs thus filed Notices of Appeal to the U.S. Court of Appeals for the Fifth Circuit and also to this Court.

Plaintiffs currently are in the highly anomalous position of having to file a Jurisdictional Statement in this Court in a case in which they maintain that this Court lacks jurisdic-

tion to hear the appeal, since the case was not one that properly could be heard by a three-judge court.

In this Jurisdictional Statement, plaintiffs first urge this Court to dismiss this appeal for want of jurisdiction so as to allow this case to proceed on appeal in the U.S. Court of Appeals for the Fifth Circuit. To the extent, however, that this Court may decide not to dismiss this appeal, plaintiffs submit that the issues on the merits are so substantial as to justify plenary review.

OPINIONS BELOW

None of the opinions of the district court has been reported.

The August 24, 1973, slip opinion of the district court convening a statutory three-judge district court is attached hereto as Appendix A. The September 30, 1977, slip opinion of the district court denying plaintiffs' motion to dissolve the statutory three-judge district court is attached hereto as Appendix B. The March 2, 1978, slip opinion of the district court dismissing various suburban school districts from the case is attached hereto as Appendix C. The September 24, 1979, slip opinion of the district court dismissing the case is attached hereto as Appendix D.

JURISDICTION: STATEMENT OF THE REASONS WHY THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL

This interdistrict school desegregation case was filed in 1972 by black parents whose children attend school in the Atlanta, Georgia, school district. Plaintiffs--now appellants --alleged violations of the Fourteenth Amendment and of 42

U.S.C. §1983 by the Georgia State Board of Education and its duly appointed members, the Georgia Superintendent of Public Instruction, the Atlanta Board of Education, and six county and three small city boards of education in the Atlanta metropolitan area. Jurisdiction was conferred on the court below by 28 U.S.C. §1331(a), and 28 U.S.C. §§1343(3) and (4).

After plaintiffs filed this case, defendants moved for the convening of a three-judge district court. Plaintiffs objected on the grounds that their challenge was to defendants' unconstitutional actions, and that the only state laws whose constitutionality was drawn into question either required segregation and prohibited desegregation or interfered with the remedy sought by plaintiffs--issues which do not require the convening of a three-judge district court. A three-judge district court nonetheless was convened pursuant to the now-repealed 28 U.S.C. §2281, and that court on August 24, 1973, directed that the case proceed both as a single-judge and as a three-judge court case. See Appendix A. On September 30, 1977, the court denied plaintiffs' motion to dissolve the three-judge court. See Appendix B. Stating that this was one of those "unclear cases," Appendix B at pp.5-6, the court again directed that the case proceed as both a single-judge and three-judge court case, and further directed that the evidence in this case be heard only by the single-judge court. Id.

Following the presentation of plaintiffs' evidence, the district court on March 2, 1978, entered an Order and Opinion dismissing plaintiffs' case against various of the suburban school districts. See Appendix C. A Final Order and Opinion dismissing plaintiffs' case in its entirety on the merits was entered jointly and separately by the single-judge district court and by the three-judge district court on September 24, 1979. See Appendix D. A Final Judgment was filed by the clerk of the district court that same day. Id.

Plaintiffs--now appellants--filed a timely Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit on October 22, 1979, see Appendix E, and also filed a timely Notice of Appeal to this Court on October 22, 1979, see Appendix F. After an Amended Final Judgment was filed in the district court on October 29, 1979, see Appendix G, appellants filed Amended Notices of Appeal on November 9, 1979, to the U.S. Court of Appeals for the Fifth Circuit, see Appendix H, and to this Court, see Appendix I. An Order entered by Mr. Justice Powell on December 13, 1979, extended the time for filing this Jurisdictional Statement to and including February 19, 1979. See Appendix J.

The jurisdiction of this Court to review the decision of the district court below--to the extent that the decision was rendered by a statutory three-judge district court--arguably is conferred by 28 U.S.C. §1253. But this Court's jurisdiction under 28 U.S.C. §1253 is limited to only those proceedings which were "required" to have been heard by a statutory three-judge district court.

As plaintiffs contended below, this proceeding is not one which should have been heard by a three-judge district court pursuant to the now-repealed 28 U.S.C. §2281.[1] If plaintiffs are correct in this contention, this Court is without jurisdiction to hear this appeal.

The "threshold question" in this case thus is whether this Court has jurisdiction under 28 U.S.C. §1253 on direct appeal from the decision of the three-judge district court

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1. Although 28 U.S.C. §2281 was repealed in 1976 by the Act to Improve Judicial Machinery, Pub.L. No. 94-381 (Aug. 12, 1976), 90 Stat. 1119, Congress provided in §7 of the Act that: "This Act shall not apply to any action commenced on or before the date of enactment [Aug. 12, 1976]." 90 Stat. at 1120. Since this litigation was commenced prior to enactment, the repeal of 28 U.S.C. §2281 technically is irrelevant here.

"purportedly convened pursuant to 28 U.S.C. §2281." Moody v. Flowers, 387 U.S. 97, 99 (1967). This Court, of course, does not have jurisdiction unless this "case was one required to be heard by a three-judge court. 28 U.S.C. §1253." Board of Regents v. New Left Education Project, 404 U.S. 541, 542 (1972).

In this interdistrict school desegregation case, plaintiffs as noted alleged that defendants in concert with other state officials had acted in violation of the Fourteenth Amendment and 42 U.S.C. §1983. See plaintiffs' Amended and Substituted Complaint set out in Appendix K. The essence of the remedy sought by plaintiffs from the district court was the transfer of students between various of the ten school districts in the Atlanta metropolitan area[2] in order to eliminate the condition of interdistrict segregation caused by defendants and other government officials. Id.

Primarily to effect this equitable remedy, plaintiffs requested an injunction against certain provisions of the Georgia Constitution and of various state laws.[3] Under the teachings of this Court, none of the relief sought made this case one which was required to be heard by a statutory three-judge district court.

First, because this is a school desegregation case, plaintiffs asked for a pro forma declaration of unconstitutionality and an injunction against the enforcement of "Georgia Constitution, Article VIII, Section I (1945), to the extent that it provides for separate schools for the white and

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2. As plaintiffs contended below, state law already provides a basis for the interdistrict remedy sought by plaintiffs. Specifically, Ga. Code Ann. §§32-628a, et seq., created various interdistrict "Cooperative Educational Services Agencies for the purpose of 'sharing services which are designed to improve the effectiveness of educational programs of member local school systems.'" Appendix D at p.8. Such an agency, M-CESA, exists in metropolitan Atlanta.

3. The provisions are set forth under Statutes and Constitutional Provisions Involved, see pp. 9-12, infra, and are described in Appendix K at pp.38-39.

colored race." See Appendix K at p.38. Ever since Brown v. Board of Education, 347 U.S. 483 (1954), any claim that such a law is not unconstitutional would be "plainly insubstantial," Goosby v. Osser, 409 U.S. 512, 518 (1972), and it thus can be declared unconstitutional by a single-judge district court, Bailey v. Patterson, 369 U.S. 31 (1962).

Second, for the same reasons and in the same manner, plaintiffs sought the same relief with respect to "Ga. Code §32-847, to the extent that it prohibits students from being compelled to attend certain schools on account of race; [and] Ga. Code §32-848, to the extent that it prohibits teachers from being compelled to teach at certain schools on account of race." See Appendix K at p.38. These antidesegregation laws barring desegregation remedies are patently unconstitutional. North Carolina Board of Education v. Swann, 402 U.S. 43 (1971). Thus, any claim that such laws are not unconstitutional is "plainly insubstantial," Goosby v. Osser, supra, and they thus can be held unconstitutional by a single judge, Bailey v. Patterson, supra.[4]

Finally, in view of the interdistrict remedy sought by plaintiffs in the event they prevailed on the merits, plaintiffs sought a remedial injunction against the enforcement of "Ga. Constitution Article VIII, Section V (1945) and Ga. Code §32-901, to the extent that they confine control and management of public schools within counties to a County Board of Education, and Article VIII, Section VII (1945), where such Constitutional provisions conflict with any inter-district remedy adopted by the Court to eliminate unlawful racial

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4. Despite the patent unconstitutionality of the foregoing state laws and constitutional provision, the district court did not enter any relief affecting them. The focus of the court, at least with regard to the convening and maintaining of the three-judge court, was the interdistrict relief sought by plaintiffs in the event they prevailed on the merits. See Appendix A at p.2; Appendix B at pp.3-5.

segregation remaining in Atlanta schools"; and plaintiffs also asked that defendants "be enjoined from enforcing or maintaining the school system boundary lines as provided for in Georgia Constitution §2-7001 as a legal barrier to transfers of students across said lines for the purpose of implementing a school desegregation plan for the metropolitan Atlanta area." See Appendix K at pp.38-39. These concededly valid laws were addressed by plaintiffs not because they caused any violations of the Fourteenth Amendment or of §1983 but because they arguably stood in the way of the federally mandated interdistrict relief sought by plaintiffs. The most that plaintiffs asked for and might have been entitled to was the suspension of those laws to effect their sought-after relief. This falls far short of what is necessary to invoke the now-repealed 28 U.S.C. §2281. As this Court recently held, it is wrong for a lower court to view "the possible suspension of an otherwise valid state statute to effectuate federally mandated relief as equivalent to finding that statute unconstitutional." Costello v. Wainwright, 430 U.S. 325, 326 (1977). In this instance, convening a three-judge district court is inappropriate for it "would require postponing the threshold question of jurisdiction until the merits of the controversy had been fully resolved and the broad outlines of equitable relief discerned. Section 2281 embodies no such wasteful and uncertain mandate." Id. In the instant case, which was dismissed on the merits, the rough outlines of the appropriate equitable relief were not even reached.[5] More so than in Costello, a three-judge district court was not required.

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5. To the extent that any temporary suspension of the challenged state laws would have been necessary at the remedial stage of these proceedings, the injunction would not have had a state-wide effect but would have been effective only in the six-county Atlanta metropolitan area. Accordingly, a three-judge court again was not required. Board of Regents v. New Left Education Project, 404 U.S. 541 (1972); Moody v. Flowers, 387 U.S. 97 (1967).

Seeking to distinguish Costello, the district court stated that no state law had been challenged "on its face," while here "the complaint involves a very real attack on various portions of the Georgia Constitution and statutes of the state of Georgia." Appendix B at pp.4-5. While the district court may have considered the interdistrict remedy sought by plaintiffs to be "a very real attack" on interdistrict school segregation, the fact remains that plaintiffs here had not challenged the constitutionality of any arguably valid state law within the meaning of 28 U.S.C. §2281. As in Costello, the "suspension of an otherwise valid statute to effect federally mandated relief [is not] equivalent to finding that statute unconstitutional." 430 U.S. at 326.[6]

It is not without significance that the three-judge court here, when it formally convened itself, was unsure of the correctness of its decision. The court thus directed that the case proceed as both a single-judge and three-judge district court case, a procedure which it described as "the safest though somewhat cumbersome course." Appendix A at p.2. When the court later denied plaintiffs' motion to dissolve the three-judge district court, the court observed that this

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6. In its opinion denying plaintiffs' motion to dissolve the three-judge court, the district court referred to the "elusive" and "subtle" distinction between "an attack on the constitutionality of a statute as applied and an attack on the result of application of a statute the constitutionality of which is not in question." Appendix B at p.3. With all due respect to the district court, that elusive and subtle distinction is not presented in the present case, and in any event, the distinction is no longer so elusive and subtle after Costello. An attack on the result of the application of a statute in the context of the statute's being interposed as a bar to equitable relief is not at all an attack on the constitutionality of the statute within the meaning of 28 U.S.C. §2281. Rather than being unconstitutional as applied, any such statute simply cannot be applied where its application would interfere with the implementation of a federal court remedial order. Costello v. Wainwright, 430 U.S. 325 (1977), makes it clear that a three-judge court is not required where a federal court's remedial order requires state officials to take action inconsistent with state law, which is all that plaintiffs have sought in the present case.

was one of those "unclear cases," and that the case should continue as a single-judge and three-judge district court case and that the "case shall be tried with the originating judge designated to receive the evidence." Appendix B at pp.5-6.

Again, the three-judge district court overstepped the bounds of law--for the "safest course" in a "close case" is not to convene a three-judge district court. As this Court has held, "a contrary view of this case would be inconsistent with our oft-repeated admonition that the three-judge court statute is to be strictly construed." Board of Regents v. New Left Education Project, 404 U.S. 541, 545 (1972). See also, Allen v. State Board of Elections, 393 U.S. 544 (1969); Phillips v. United States, 312 U.S. 246, 251 (1941). Not only is the now-repealed §2281 to be strictly construed, but 28 U.S.C. §1253 too must be narrowly construed in view of the "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court." Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974).

The district court erred as a matter of law in convening a three-judge district court pursuant to the now-repealed 28 U.S.C. §2281. Since this case was not "required" to be heard by a district court of three judges, this Court lacks jurisdiction under 28 U.S.C. §1253.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Plaintiffs, in their Amended and Substituted Complaint below, alleged a deprivation of their rights, privileges and immunities secured by the Constitution of the United States. Primary among the constitutional guarantees is Section 1 of the Fourteenth Amendment which states in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiffs also alleged violations of 42 U.S.C. §1983, which states in full:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

A statutory three-judge district court was convened below pursuant to the now-repealed 28 U.S.C. §2281, which provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

An appeal from a final order by a properly constituted three-judge district court may be taken directly to this Court pursuant to 28 U.S.C. §1253, which states:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

Defendants moved for the convening of a statutory three-judge district court below on the grounds that plaintiffs--now appellants--sought to enjoin the enforcement of various state laws and constitutional provisions which mandated segregation or arguably interfered with the equitable inter-district school desegregation relief sought by plaintiffs. Those state laws and constitutional provisions are set forth hereafter.

Georgia Constitution, Article VIII, Section I, Chapter 2-6401 (1945), which plaintiffs sought to enjoin insofar as it mandates segregation in the schools, provides:

> "The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation. Separate schools shall be provided for the white and colored races."

Georgia Code §32-847, and Georgia Code §32-848, which plaintiffs sought to enjoin insofar as they bar students and teachers from being reassigned on the basis of race in a desegregation remedy, respectively provide in relevant part:

> "No student shall be assigned to or compelled to attend any school on account of race, creed, color or National origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of students of one or more particular races, creeds, colors or National origins, and no school district or school system, by whatever name known, shall be established, reorganized or maintained for any such purpose."

> "No teacher shall be assigned to or compelled to teach at any school on account of race, creed, color, or National origin, or for the purpose of achieving a certain ratio at any school of teachers of one or more particular races, creeds, colors or National origins, and no school district or school system, by whatever name known, shall be established, reorganized or maintained for any such purpose."

Finally, Georgia Constitution, Article VIII, Section V,

Chapter 2-6801; Georgia Code §32-901; and Georgia Constitution, Article VIII, Section VII, Chapter 2-7001, which plaintiffs sought to enjoin insofar as they confine control and management of public schools to county boards of education and to municipal corporations and conflict with the interdistrict school desegregation remedy sought by plaintiffs, respectively provide in relevant part:

> "Each county, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a County Board of Education."

> "Each and every county shall compose one school district, and shall be confined to the control and management of a county board of education."

> "Authority is hereby granted to municipal corporations to maintain existing independent school systems, and support the same as authorized by special or general law, and such existing systems may add thereto colleges. No independent school system shall hereafter be established."

QUESTIONS PRESENTED

In the Jurisdiction section of this Jurisdictional Statement, plaintiffs--now appellants--have argued that this Court lacks jurisdiction to hear this appeal, and that their appeal thus should be dismissed for want of jurisdiction. The jurisdictional question is as follows:

> 1. Is a school desegregation case "required" to be heard by a three-judge district court pursuant to 28 U.S.C. §2281 where the only state laws whose constitutionality is drawn into question either are segregation and antidesegregation laws or are laws that affect only the interdistrict remedy sought by plaintiffs?

If this Court were to note probable jurisdiction, the issues on the merits are as follows:

2. Is it error for a district court to arbitrarily hold irrelevant all evidence of discriminatory actions taken prior to 1967 in an interdistrict school desegregation case filed in 1972 by plaintiffs who allege that the schools have been intentionally segregated in violation of the Fourteenth Amendment?

3. Is it error for a district court to dismiss an interdistrict school desegregation case on the merits where plaintiffs proved interdistrict violations in the manner prescribed by Milliken v. Bradley, 418 U.S. 717 (1974), and where the trial court concluded that "official acts of government officials at all levels contributed to the separation of the races in education" and "in housing"?

STATEMENT OF THE CASE

Not only in 1954, but continuing through to the mid-1960s, the schools in the six-county Atlanta metropolitan area[7] were segregated by law. See Appendix D at p.3. By 1972, the inner-city Atlanta school district--where the State earlier and for decades had maintained "the only black high school in

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7. Atlanta, the black core of the six-county metropolitan area, lies within two counties, Fulton County and Dekalb County. Altanta splits Fulton County in half with unincorporated north Fulton to the north of the City and unincorporated south Fulton to the south. Atlanta also extends east into southwestern Dekalb County.

In the six-county metropolitan area, Atlanta is surrounded by the following counties in a clockwise manner: north Fulton County to the north; Dekalb County and Gwinnette County to the east; Clayton County to the southeast; south Fulton County to the south; Douglas County to the southwest; and Cobb County to the west and northwest.

Atlanta and its school district are predominantly black. The surrounding counties and their school districts are overwhelmingly white.

the six county area, involved in this case," Appendix D at p.4--was nearly 90% black. The six surrounding county school districts were overwhelmingly white.

This interdistrict segregation between the black inner city of Atlanta and its white suburbs was not surprising in view of the overt segregation practiced by government officials from Plessy v. Ferguson, 163 U.S. 537 (1896), through the mid-1960s. The facts and causes of this interdistrict segregation--now a matter of court record and court findings --spurred the filing of this interdistrict school desegregation case in 1972. It was supported in part by three major premises.

First, interdistrict segregation in the six-county Atlanta area was caused by a system of interdistrict segregative transfers. As the district court later found, this interdistrict transfer system was in effect for nearly 60 years and "the transfer was used to preserve segregation in the schools." Appendix D at pp.3-4. Interdistrict segregation also was caused by such practices as placing and maintaining for decades in the heart of Atlanta the metropolitan area's only black high school. Id.

Second, official school segregation was known to have a substantial impact upon residential segregation As the district court ultimately found in this case: "The race of schools helped to designate the race of the land on which they were located and the neighborhood which they served, just as the race of the neighborhood determined the race of the schools until well after the 1954 decision in Brown v. Board of Education." Appendix D at p.13. Moreover, official school segregation, especially in Atlanta with its sizeable black population, lasted well after Brown. As late as "the 1961-1962 school year, when a few black students entered white schools in Atlanta, all schools in the state were

totally segregated." Appendix D at p.3. In fact, in some of the predominantly white suburban counties, official school segregated lasted even longer. "Until 1970 in [suburban] Fulton County and 1969 in [suburban] DeKalb County, attendance zones were separated into white or black zones." Appendix D at p.15. "It need not be reiterated that racial designation of the school in a given area tends to designate the race of the neighborhood." Id.

Third, interdistrict segregation in the six-county Atlanta metropolitan area was caused by more than just racial designation of schools. Based upon an "impressive amount of evidence," the court below found that plaintiffs' evidence "shows that separation of the races has existed in housing patterns in the Atlanta metropolitan area for the past 50 years," Appendix D at p.28,[8] and that this separation is not and never has been adventitious: "That this condition of racial separation was caused in part by the intentional acts of government officials has also been shown." Id.

In 1972, black parents whose children attended segregated schools in the nearly 90% black Atlanta school system filed this interdistrict school desegregation lawsuit. They alleged violations of the Fourteenth Amendment and of 42 U.S.C. §1983 by defendants Georgia State Board of Education and its duly appointed members, the Georgia Superintendent of Public Instruction, the Atlanta Board of Education, and six county and three small city boards of education in the Atlanta metropolitan area, and they sought an interdistrict school desegregation remedy involving the transfer of students between

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8. The district court added: "It is clear from the plaintiffs' evidence, and indeed would be obvious to anyone who is familiar with metropolitan Atlanta, that there are very few integrated neighborhoods in the Atlanta area." Appendix D at p.30. Indeed, "it is obvious to the most casual observer that integrated housing patterns do not prevail in the Atlanta metropolitan area." Id. at p.32.

various of the school districts in the Atlanta metropolitan area so as to eliminate the condition of interdistrict school segregation caused by the defendants in concert with other governmental entities.[9]

Although this case was filed prior to this Court's decision in Milliken v. Bradley [Milliken I], 418 U.S. 717 (1974), it proceeded into discovery and was tried to the district court on the liability issue after the Milliken I decision. Unlike Milliken I, where the suburban school districts were invited into the case only after the liability proceedings had concluded, the suburban districts here were brought into this case at the outset and were fully represented at the liability trial. In adducing proof at trial, plaintiffs here carefully followed the guidance provided by this Court in Milliken I. Plaintiffs' evidence--showing, e.g., severe interdistrict school and housing segregation, a history of intentional interdistrict school transfers to maintain segregation, and a history of intentional governmental actions causing the severe interdistrict residential segregation in metropolitan Atlanta--was eventually characterized by the district court as "truly staggering." Appendix C at p.14.

The district court's findings of fact represent only a small part of the truly staggering scope of plaintiffs' evidence. In its findings, the district court nonetheless listed part of the history of interdistrict transfers used to maintain the dual school system in metropolitan Atlanta:

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9. As is set forth in the Jurisdiction section of this Jurisdictional Statement, see pp. 2-9, supra, a three-judge district court was convened, over plaintiffs' objections, to hear this case. See Appendices A & B. That court directed that this case proceed as both a single-judge and three-judge court case, and that the evidence in this case be heard only by the single-judge court. Id.

--"From 1903 to 1964 students could cross system lines.... Systems sometimes contracted for the exchange of students in order that the receiving system might receive state funds for such students.... Historically, the transfer was used to preserve segregation in the schools." Appendix D at pp.3-4.

--"For many years Booker T. Washington High School [in Atlanta] was the only black high school in the six-county area involved in this case." Appendix D at p.4.

--"From 1940 to 1965-66 the State Board of Education paid State funds to Marietta for the transfer of from 41 to 274 black Cobb County high school students across system lines to the black high school in Marietta." Appendix D at pp.4-5.

--"Those black students who desired a high school education were forced to attend Booker T. Washington High School in Atlanta or a black high school in Marietta.... These are only two of the many examples of transfer of students across system lines in order to preserve a dual school system in Georgia." Appendix D at pp.4-5.

State funds, the district court found, were used to pay for these segregative transfers:

--"In many instances throughout the state the financial burdens of a dual school system necessitated the use of facilities in other school districts for black students. State funds were used to pay the receiving system, with local systems paying for the transportation of students who transferred and parents paying tuition for requested students." Appendix D at p.4.

The state did more than simply pay for segregation. It required segregation hand-in-glove with the ten school districts in metropolitan Atlanta. As the district court found:

--"Under the Constitution of Georgia, Ga.Code Ann. §2-6401, the state has primary responsibility for providing education for its citizens and separate schools for the races." Appendix D at p.2.

--"Government acts in the past tended to foster the building and maintenance of a dual school system." Appendix D at p.2.

Again, state monies were provided:

--"State funds for construction of schools were first made available under the Capital Outlay Program begun in 1950. Under this first Capital Outlay Program and a second capital outlay program in 1960, sites were selected and schools were planned on a segregated basis." Appendix D at p.3.

The results of these actions were devastatingly successful in creating and maintaining segregation:

--"Until the 1961-62 school year, when a few black students entered white schools in Atlanta, all schools in the state were totally segregated. Appendix D at p.3.

--"Until 1961 the public schools of Atlanta were completely segregated.... Some 47 schools designated by race were opened after 1954 by the City of Atlanta." Appendix D at p.13.

--"53 of the 55 City of Atlanta schools which were built or designated as black schools or converted from white to black prior to 1970 remain black today." Appendix D at p.9.

These specific findings, among others, led the district court to a conclusory finding of fact:

--"Historically, official acts of government officials at all levels contributed to the separation of the races in education." Appendix D at p.2.

The acts of these officials contributed not only to segregation in education but also to segregation in housing patterns. The relationship between segregated schools and segregated housing patterns, an interface usually assumed, here was reduced to findings of fact:

--"The race of schools helped to designate the race of the land on which they were located and the neighborhood which they served, just as the race of the neighborhood determined the race of the schools until well after the 1954 decision in Brown v. Board of Education." Appendix D at p.13.

--"It need not be reiterated that racial designation of the school in a given area tends to designate the race of the neighborhood." Appendix D at p.15.

--"It is also patently obvious that there is an interface between housing patterns and school populations." Appendix D at p.32.

In some instances, this interface was immediate and direct. As the district court found:

--"A City of Atlanta ordinance of 1931 prohibited a person of one race from moving into a housing unit last occupied by a person of another race if the housing unit was located within 15 blocks of a public school unless a permit was granted by the General Counsel of the Borough of Atlanta." Appendix D at p.10.

--"Prior to 1965 all [public] housing in the metropolitan area [83% of which was in the City of Atlanta] was segregated, black projects being built in the area of black residential areas or in areas designated by housing authorities as sites for future black residential expansion. Segregated schools were built adjacent to black projects." Appendix D at pp.15-16.

In other instances, the interface was less immediate but equally effective. For example, as the district court found,

the housing (old and planned) in western, southern and southeastern Atlanta was converted to all-black housing by official government actions continuing through the 1960s. It began with official racial zoning:

--"An ordinance of the City of Atlanta of 1924 designated certain areas of Atlanta for black occupancy (R-2) and certain areas for white occupancy (R-1)." Appendix D at p.10.

Thereafter, the concentration and conversion were accomplished through other government actions:

--"Officials of the City of Atlanta caused to be erected various barriers, boundaries and buffer zones between black and white areas." Appendix D at p.11.

Not all of these actions worked. Nonetheless, government officials were able to convert Atlanta into a predominantly black city through metropolitan planning and official blockbusting:

--"The Metropolitan Planning Commission, established in 1947, and the Westside Mutual Development Committee, established in 1952, played an important part in the determination of areas for black expansion. The purpose of the Metropolitan Planning Commission was to prepare a master plan for orderly growth and development of the metropolitan area. This included planning for Negro expansion. The purpose of the Westside Mutual Development Committee, on the other hand, was to facilitate conversion of designated residential areas from white to black. The Westside Mutual Development Committee acted with neighborhood groups in facilitating an orderly transition of neighborhoods." Appendix D at p.12.

--"During the 1950s the mayor [of Atlanta] appointed a number of bi-racial neighborhood committees to facilitate the transition of various areas suitable for the development of black subdivisions. The purpose of these bi-racial committees was to ease racial tensions in areas of new or transfer black housing." Appendix D at pp.12-13.

While government officials primarily in the 1940s, 1950s and 1960s converted western, southern, and southeastern Atlanta into an all-black residential area, government officials in the suburban areas outside of Atlanta eliminated or severely curtailed the growth of the black communities already existing in suburban areas. These actions had the reciprocal effect of concentrating the black population in Atlanta. As the district court concluded:

--"Historically, the official acts of local government units outside of the City of Atlanta discouraged movement of blacks into those areas and discouraged the continuation of black enclaves already located there." Appendix D at p.13.

Numerous specific findings backed up this conclusion. For example:

--"In some instances there have been active steps taken to discourage the presence of blacks. An example of this is the condemnation of the black homes in the Bagley Park area by Fulton County officials in 1947. The residential area condemned was replaced by a park designated for the use of whites only. Many of the dispossessed Negro families moved into already overcrowded housing in the City of Atlanta." Appendix D at p.14.

--"Although both the Urban League and the Metropolitan Planning Commission recommended in the late 1940s and early 1950s that the Lynwood Park Community in DeKalb County be extended for Negro expansion, this recommendation was not accepted. In fact, the closing of Mabry Road to the south, Osborne Road to the north, and a dirt road to the west cut off the black community located there." Appendix D at p.14.

--"The black community located in Chamblee in DeKalb County disappeared between 1950 and 1970." Appendix D at p.14.

--"In 1956 a black owner of ten acres on LaVista Road in DeKalb County attempted to obtain zoning approval to subdivide his land for black residential expansion. Because of white opposition the black owner withdrew his application." Appendix D at pp.14-15.

--"Urban renewal projects in Decatur, Georgia [in DeKalb County], in the early 1960s caused over 400 black families to be displaced. Relocation sites in north DeKalb County were not accepted, and the bulk of the displaced population moved into the Kirkwood area in east Atlanta or into the Scottdale area, a black enclave close to the urban renewal area. The end result of the relocation of families displaced by urban renewal in Decatur was an increase in the black population of the City of Atlanta and south DeKalb County. [The eastern part of the City of Atlanta lies within south DeKalb County.]" Appendix D at p.15.

The concentration of the black population in Atlanta and the preclusion of black residential development in the suburbs were accomplished not just by the foregoing official actions. Another series of official actions was the location of public housing. As the district court found:

--"Location of public housing has tended to concentrate the black population of the metropolitan area within the City of Atlanta." Appendix D at p.15.

It must be recalled that segregation in education and in housing, including of course public housing, was open, admitted and officially enforced through the mid-1960s:

--"Prior to 1965 all housing in the metropolitan area was segregated, black projects being built in the area of black residential areas or in areas designated by housing authorities as sites for future black residential expansion. Segregated schools were built adjacent to black projects." Appendix D at pp.15-16.

Most of the public housing in metropolitan Atlanta was built within the City of Atlanta:

--"There are 23 public housing authorities in the six-county Atlanta metropolitan area. As of 1975 the Atlanta Housing Authority had constructed and was managing a total of 15,336 units of public housing, with another 864 units under construction. This represented 83% of the public housing in the Atlanta metropolitan area." Appendix D at p.15.

The siting of this massive amount of public housing was used to designate and concentrate black residential areas:

--"Until 1964 all public housing units built by the Atlanta Housing Authority for blacks were placed in established communities or in areas earmarked for Negro expansion. When the projects began to be desegregated in the mid-1960s, blacks were guided only to those white projects south of the North Avenue-Ponce de Leon line. Four new housing projects which opened in 1968 and 1969, Perry Homes Extension, McDaniel-Glenn Apartments, Bankhead Courts, and Hollywood Courts, continued to concentrate the black population. Projects opened in the 1970s have tended to scatter public housing throughout the city. All of these projects, however, have either been located in southwest Atlanta or in transitional areas." Appendix D at p.18. [Note: "transitional" areas in Atlanta are integrated neighborhoods designated for conversion to black neighborhoods.]

On several occasions, the Atlanta Housing Authority sited a public housing project adjacent to but outside of the City of Atlanta in suburban Fulton County. The land on which such projects were sited, however, was always annexed by the City of Atlanta, thereby adding to the black residential and school population of Atlanta while maintaining the all-white character of the suburban counties:

--"The Atlanta Housing Authority was authorized by Ga. Code Ann. §99-1103(f) to build within ten miles beyond the Atlanta city limits into unincorporated Fulton County. Prior to 1971 the land on which the Atlanta Housing Authority planned black housing projects in unincorporated Fulton County was always annexed by the City of Atlanta before the project was opened. This sequence of events took place in regard to Carver Homes, Perry Homes [the largest public housing project in the metropolitan area], and Kimberly Road Homes." Appendix D at p.16.

On one occasion, in 1970, the Atlanta Housing Authority developed a site south of Atlanta deeper into south Fulton County. The responsive actions of Fulton County officials led to judicial findings of intentional and unlawful discrimination:

--"When the Atlanta Housing Authority in 1970 decided to build public housing in portions of unincorporated Fulton County that were not adjacent to Atlanta, Fulton County officials denied permits to two developers. This action was found to constitute unlawful racial discrimination in Crow v. Brown, 332 F.Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972). Pursuant to the court's order in Crow, a Joint Committee for the Selection of Public Housing Sites was created, and in a report issued in 1972 the Committee recommended numerous sites in unincorporated Fulton County for public housing. No public housing has been built on any of these sites.... Development of public housing in these sites was precluded by rezoning, denial of parking variances, etc." Appendix D at pp.16-18.

Overall, the actions of the suburban housing authorities added to the concentration of blacks within the City of Atlanta:

--"In addition to the Fulton County Housing Authority and the Atlanta Housing Authority, there are seven municipal housing authorities in Fulton County. According to plaintiffs' figures, there have been no housing units built by any of these housing authorities since 1970." Appendix D at p.17.

--"Each of the municipal housing authorities and the Fulton County Housing Authority mentioned above, with the exception of the Atlanta Housing Authority, has a residency preference for areas for applicants residing in their respective areas. Each has a waiting list with waiting periods of several months to three years." Appendix D at p.17.

--"In DeKalb County there are four housing authorities operating in that portion of DeKalb County which is not Atlanta. These are the DeKalb County Housing Authority, the Decatur Housing Authority, the Lithonia Housing Authority, and the Doraville Housing Authority, which is now inactive. According to plaintiffs' figures, the latest public housing built by any of these authorities was built in 1970. All three housing authorities have long waiting lists. All three have residence preferences for applicants residing in DeKalb County." Appendix D at pp.17-18.

--"As opposed to other housing authorities in the metropolitan area, the Atlanta Housing Authority has never had a residence requirement. As of 1974 there were more than 7,200 families on the Atlanta Housing Authority's waiting list, 91 to 92% of which were black." Appendix D at p.18.

Plaintiffs' evidence of segregated housing patterns in metropolitan Atlanta caused by government actions was equally as extensive as plaintiffs' evidence of segregated schooling in metropolitan Atlanta caused by government actions. As the district court concluded:

--"Historically, official acts of government officials at all levels contributed to the separation of the races in housing." Appendix D at p.10.

Despite plaintiffs' overwhelming evidence--illustrated by the foregoing findings of fact--of government contributions to interdistrict segregated schooling and interdistrict segregated housing in metropolitan Atlanta, the district court declined to find violations of the Fourteenth Amendment and

of 42 U.S.C. §1983. Instead, the district court dismissed plaintiffs' case in two phases.

After plaintiffs presented their case, seven of the suburban defendants moved to dismiss plaintiffs' case for failure to state a claim. The district court granted their motions on grounds different from those sought by defendants. Appendix C. First, the court held that "the past history of racial segregation is not relevant to a consideration of these defendants' motions to dismiss. The court finds it unnecessary to specifically consider documentary evidence relating to events occurring prior to 1967." Appendix C at p.16. Second, after applying its five-year relevancy test to plaintiffs' case filed in 1972, the court proceeded to find "no significant violations of recent vintage." Appendix C at p.26. In applying a five-year relevancy rule and in making its findings, the district court conceded that it was affected primarily by the interdistrict student transfer remedy sought by plaintiffs. Characterizing such relief as a "drastic remedy," the court held that "it is only realistic [at the liability stage] to measure the extent of violations alleged against the relief sought." Appendix C at p.27.

Despite the district court's dismissal of the outlying suburban defendants, the remaining defendants (the school boards in Atlanta, in Fulton County, and in DeKalb County, and the state defendants) chose not to file similar motions to dismiss. Instead, they proceeded to present their evidence against a finding of liability. Thereafter, plaintiffs presented a short rebuttal case. Then, the court dismissed plaintiffs' case against the remaining defendants. Appendix D. Although the court abandoned its five-year relevancy rule, it adopted similar reasoning.

First, the court disregarded plaintiffs' evidence and its own findings concerning the substantial use of segregative

interdistrict transfers to maintain the dual school system in metropolitan Atlanta, and instead concentrated on the 1979 intradistrict remedial status of the three remaining defendant school districts:

--"The court has found that the defendant school systems remaining in this case have either been declared unitary or are presently operating under final desegregation orders of this court. Once a system is declared unitary, it would stand to reason that the past history of segregation in that system would no longer be relevant to an inquiry into the existence of present-day constitutional violations. Furthermore, plainiffs have shown no intent to discriminate on the part of any school official of any defendant school system during the years since they were declared unitary or have been operating under court-ordered plans. The court, therefore, finds that there have been no constitutional violations by school officials of the defendant school systems which would justify the imposition of the interdistrict remedy sought by the plaintiffs." Appendix D at pp.26-27.

Second, the district court disregarded plaintiffs' evidence and its own findings concerning the responsibility of school officials for contributions to segregated housing patterns and the responsibility of government officials for creating segregated housing patterns in metropolitan Atlanta. Instead, the court chose to look blindly only at present-day 1979 government actions:

--"The plaintiffs have shown no evidence that present-day governmental discrimination plays any role in these segregated housing patterns. Governmental discrimination played a significant role in the past, but plaintiffs have not shown that any of them has sought and been denied any housing because of governmental discrimination." Appendix D at p.21.

Yet, the court conceded, as it had to, that the segregated housing patterns had been caused at least in part by intentional governmental actions:

--"Plaintiffs have amassed an impressive amount of evidence which shows that separation of the races has existed in housing patterns in the Atlanta metropolitan area for the past 50 years. That this condition of racial separation was caused in part by the intentional acts of governmental officials has also been shown." Appendix D at p.28.

Nonetheless, the court remained most influenced by the inter-district student transfer remedy sought by plaintiffs:

--"The court concludes that whatever effect past housing violations have had upon the schools is too attenuated to constitute the type violation which would justify imposition of an interdistrict remedy." Appendix D at p.32.

Orders dismissing plaintiffs' case were entered by the single-judge district court and by the three-judge district court on September 24, 1979. Appendix D. On that same date, a Final Judgment was entered by the Clerk. Id. An Amended Final Judgment was filed on October 29, 1979. Appendix G.

Plaintiffs filed Notices of Appeal to the U.S. Court of Appeals for the Fifth Circuit and to this Court from the initial Final Judgment on October 22, 1979. Appendices E & F. Amended Notices of Appeal were filed to both courts from the Amended Final Judgment on November 9, 1979. Appendices H & I.

Plaintiffs' appeal has been docketed in the Fifth Circuit. For the reasons stated in the Jurisdiction section at pp. 2-9, infra, plaintiffs believe that this Court is without jurisdiction to hear this appeal, and that the appeal in this case lies in the Fifth Circuit. On the merits, plaintiffs submit that the court below erred as a matter of law.

SUBSTANTIAL STATUTORY AND CONSTITUTIONAL QUESTIONS ARE PRESENTED

In Milliken v. Bradley, 418 U.S. 717 (1974), this Court was not presented with any findings or evidence of interdistrict violations, 418 U.S. at 745, nor with "any question concerning possible state housing violations," 418 U.S. at 728 n.7. On the record and findings before this Court there thus was "no constitutional wrong calling for an interdistrict remedy," 418 U.S. at 745.

On a different factual record, however, there can be a constitutional wrong calling for an interdistrict remedy. In Chief Justice Burger's majority opinion in Milliken I, the Court concluded that "an interdistrict remedy might be in order" where it can "be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." Id. Mr. Justice Stewart, in his concurring opinion, similarly observed that "an interdistrict remedy" would be "proper, or even necessary" where it is shown "for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, or by purposeful, racially discriminatory use of state housing or zoning laws." 418 U.S. at 755 (citations omitted) (emphasis added). Additionally, where it can be proven that an existing racial "disparity" between a city and its suburbs "was imposed, fostered, or encouraged by the State or its political subdivisions, it follows that [an] interdistrict violation was shown." 418 U.S. at 756 (footnote omitted) (emphasis added).

Here, the district court's findings of fact, amply supported by plaintiffs' proof of interdistrict violations, meet and indeed exceed the criteria necessary for an inter-

district violation as set forth in Milliken I.[9]

The district court's failure to follow the teachings of Milliken I and of other Supreme Court decisions--especially in view of the district court's own findings of fact--presents substantial statutory and constitutional questions. Additionally, the district court erred as a matter of law by holding that this case was required to be heard in part by a statutory three-judge district court.

I. A SCHOOL DESEGREGATION CASE IS NOT "REQUIRED" TO BE HEARD BY A THREE-JUDGE DISTRICT COURT PURSUANT TO 28 U.S.C. §2281 WHERE THE ONLY STATE LAWS WHOSE CONSTITUTIONALITY IS DRAWN INTO QUESTION EITHER ARE SEGREGATION OR ANTIDESEGREGATION LAWS OR ARE LAWS THAT AFFECT ONLY THE INTERDISTRICT REMEDY SOUGHT BY PLAINTIFFS

The "threshold question" in this case is whether this Court has jurisdiction under 28 U.S.C. §1253 on direct appeal from the decision of the three-judge district court "purportedly convened pursuant to [the now-repealed] 28 U.S.C. §2281." Moody v. Flowers, 387 U.S. 97, 99 (1967).

For the reasons set forth in the Jurisdiction section of this Jurisdictional Statement, see pp. 2-9, supra, this case was not "required" to have been heard by a three-judge court, and this Court accordingly is without jurisdiction to hear this appeal.

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9. The findings and proof here also far exceed that in the Louisville, Indianapolis and Wilmington cases where interdistrict liability was found. See, respectively, Newberg Area Council v. Board of Education, 510 F.2d 1358 (6th Cir. 1974), cert. denied, 421 U.S. 931 (1975); United States v. Board of Commissioners of Indianapolis, 541 F.2d 1211 (7th Cir. 1976), vacated, 429 U.S. 1068 (1977), on remand, 573 F.2d 400 (7th Cir. 1978), cert. denied, 439 U.S. 1068 (1978), Evans v. Buchanan, 393 F.Supp. 428 (D.Del. 1975), sum aff'd, 423 U.S. 973 (1975).

II. THE DISTRICT COURT ERRED BY ARBITRARILY HOLDING IRRELEVANT ALL EVIDENCE OF DISCRIMINATORY ACTIONS TAKEN PRIOR TO 1967 IN AN INTERDISTRICT SCHOOL DESEGREGATION CASE FILED IN 1972 BY PLAINTIFFS WHO ALLEGE THAT THE SCHOOLS HAVE BEEN INTENTIONALLY SEGREGATED IN VIOLATION OF THE FOURTEENTH AMENDMENT

In determining whether official actions of government officials were intentionally discriminatory and hence unconstitutional, one thing is certain: remoteness in time is irrelevant. As this Court declared in Keyes v. School District No. 1, 413 U.S. 189 (1973): "We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continue to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'" 413 U.S. at 210-211.

Despite this clear admonition, the district court below dismissed seven of the suburban school districts from this case first by holding irrelevant all evidence pertaining to discriminatory actions taken prior to 1967, and then by finding that there were no current constitutional violations. See Appendix C.

In its ruling below, the district court initially conceded that the "evidence which has been amassed in this case is truly staggering." Appendix C at p.14. The district court also conceded, in view of plaintiffs' evidence that overt discrimination had been openly practiced by government officials in metropolitan Atlanta through 1964, that: "No one contends, and indeed the court can take judicial notice of the fact that no one can contend, that a condition of racial segregation did not exist in the six-county Atlanta

area prior to Brown and for many years afterward." Id. Faced with plaintiffs' staggering evidence, the district court simply chose to find it irrelevant: "its relevance to plaintiffs' case is questionable." Id. More to the point: "the past history of racial segregation is not relevant to a consideration of these defendants' motions to dismiss. The court finds it unnecessary to specifically consider documentary evidence relating to events occurring prior to 1967." Appendix C at p.16. After arbitrarily applying a five-year relevancy test to this case filed in 1972, the court proceeded to find "no significant violations of recent vintage." Appendix C at 26. The suburban school districts were thus dismissed from the case without having to rebut plaintiffs' staggering proof of intentional constitutional violations.

The use of historical evidence to prove a constitutional violation has always been deemed by this Court to be not only relevant but often necessary. In Keyes v. School District No. 1, supra, defendants complained that plaintiffs' evidence showing discriminatory actions prior to 1954 was irrelevant. This Court flatly rejected defendants' argument and held plaintiffs' evidence relevant and useful to proving a current constitutional violation. In Dayton Board of Education v. Brinkman, ___ U.S. ___, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979), this Court affirmed a current constitutional violation based on evidence dating primarily from the 1930s and 1940s. Similarly, in Columbus Board of Education v. Penick, ___ U.S. ___, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979), this Court affirmed a current constitutional violation based on evidence from as far back as 1871.

In proving and determining a constitutional violation, there of course is no five-year relevancy rule. As this Court summarized in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977): "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266 (emphasis added). Part of this sensitive inquiry demands review of the "historical background...particularly if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267. And, in making the final determination about the constitutionality of official actions, "remoteness in time certainly does not make those actions any less 'intentional.'" Keyes v. School District No. 1, 413 U.S. 189, 211 (1973).

The court below of course conducted no sensitive inquiry into the evidence of intent. Instead, it held to be irrelevant and refused to consider all of plaintiffs' evidence about discriminatory official actions which occurred prior to five years before the filing of this case. The district court's ruling is unprecedented, contrary to all authority, and erroneous as a matter of law.

III. THE DISTRICT COURT ERRED IN DISMISSING THIS INTERDISTRICT SCHOOL DESEGREGATION CASE ON THE MERITS WHERE PLAINTIFFS PROVED INTERDISTRICT VIOLATIONS IN THE MANNER PRESCRIBED BY MILLIKEN V. BRADLEY, 418 U.S. 717 (1974), AND WHERE THE COURT CONCLUDED THAT "OFFICIAL ACTS OF GOVERNMENT OFFICIALS AT ALL LEVELS CONTRIBUTED TO THE SEPARATION OF THE RACES IN EDUCATION" AND "IN HOUSING."

In Milliken v. Bradley, 418 U.S. 717 (1974), Chief Justice Burger writing for the majority stated that before an interdistrict remedy can be imposed, "it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." 418 U.S. at 744-745. The Chief Justice continued:

> "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." 418 U.S. at 745.

In his separate concurring opinion in Milliken I, Justice Stewart added that an interdistrict remedy would "be proper, or even necessary" where it is shown "that state officials had contributed to the separation of the races by drawing or redrawing school district lines." 418 U.S. at 755. Justice Stewart further observed that an interdistrict remedy would be appropriate where the racial disparity between a city and its suburbs can be shown to have been "imposed, fostered or encouraged by the State or its political subdivisions." 418 U.S. at 756 (footnote omitted). As an example, Justice Stewart mentioned the "purposeful, racially discriminatory use of state housing or zoning laws." 418 U.S. at 755.

The district court below wholly disregarded these teachings from Milliken I. By viewing this case as an

intradistrict case rather than as an interdistrict one, the court below erroneously focused on the unitary or near-unitary status of several of the individual school districts. See Appendix D at pp.26-27. Additionally, the district court disregarded not only Milliken I but also the teaching of Keyes v. School District No. 1, 413 U.S. 189, 211 (1973), that remoteness in time is not a valid consideration in finding intentional discrimination. By focusing on present-day 1979 government actions, the court below erroneously gave no consideration to plaintiffs' "impressive amount of evidence" establishing the causes and enduring effects of interdistrict segregation. See Appendix D at p.28. In fact, by entering its Final Order and Opinion dismissing plaintiffs' case, the district court disregarded its own findings of fact, such as its conclusory findings that "official acts of government officials at all levels contributed to the separation of the races in education," Appendix D at p.2, and that "official acts of government officials at all levels contributed to the separation of the races in housing," Appendix D at p.10.

Illustrative of "a constitutional violation within one district that produce[d] a significant segregative effect in another district, Milliken v. Bradley, 418 U.S. at 744-745, was the use of interdistrict transfers by the ten school districts in metropolitan Atlanta, a practice encouraged and paid for by the state to maintain a dual school system. Appendix D at pp.3-5. Additionally, as the district court found, Booker T. Washington High School in Atlanta for generations "was the only black high school in the six-county area involved in this case." Appendix D at p.4. The intended effect of this practice was obvious. "Those black students who desired a high school education were forced to attend Booker T. Washington High School in Atlanta." Id. This is but one "of the many examples of transfer of students across

system lines in order to preserve a dual school system." Appendix D at pp.4-5. Moreover, since the "race of schools helped to designate the race of the land on which they were located and the neighborhood which they served," Appendix D at p.13,[10] it is hardly surprising that the suburbs became whiter while the black community in inner city Atlanta expanded around old Booker T. Washington High School.[11]

Illustrative of government officials "contribut[ing] to the separation of the races by drawing or redrawing school district lines," Milliken v. Bradley, 418 U.S. at 755, i.e., creating "district lines [that were] deliberately drawn on the basis of race," Milliken v. Bradley, 418 U.S. at 745, was the annexation by the City of Atlanta of undeveloped suburban

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10. In Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1 (1971), a metropolitan but not an interdistrict desegregation case, this Court observed that:

> "[P]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of innercity neighborhoods." 402 U.S. at 20-21.

This observation about the interface between schools and housing in a metropolitan area was repeated in Keyes v. School District No. 1, 413 U.S. 189 (1973), where this Court stated that racial designation of schools can have "a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area." 413 U.S. at 202.

Here, that interface is a matter not of speculation but of court findings. In metropolitan Atlanta, is is "patently obvious that there is an interface between housing patterns and school populations," Appendix D at p.32, and "that racial designation of the school in a given area tends to designate the race of the neighborhood," Appendix D at p.15. This overt racial designation of schools and of land and housing continued in metropolitan Atlanta "until well after the 1954 decision in Brown v. Board of Education." Appendix D at p. 15. In fact, overt designation and official segregation continued for at least another twenty years through to the mid-1960s. Appendix D at pp.3, 15-16.

11. The expansion of the black community in inner-city Atlanta was caused not only by racial designation of the schools. It was also caused--not just contributed to--by the racial planning, racial zoning, government blockbusting, segregated public housing, etc., carried out by government officials at all levels. See Appendix D at pp.2-5, 10-18, as summarized in the Statement of the Case at pp.19-25, supra.

land that had been designated for black housing projects and adjacent black schools. Appendix D at pp.16-17. Since the Atlanta school district's boundaries have been and are co-terminus with Atlanta's municipal boundaries, these deliberate annexation practices in the 1950s and 1960s kept the suburbs white while increasing the concentration and segregation of blacks in the Atlanta schools.

These of course are but a few examples from the district court findings showing that "racially discriminatory acts... have been a substantial cause of interdistrict segregation" in metropolitan Atlanta. Milliken v. Bradley, 418 U.S. at 745. Other findings, such as those showing that interdistrict segregation was "imposed, fostered or encouraged by the State or its political subdivisions," Milliken v. Bradley, 418 U.S. at 756, are summarized in the district court's opinion. Particularly relevant are those findings concerning the governmental role in interdistrict housing segregation.

First, government officials at all levels directed and concentrated the black population from metropolitan Atlanta into the City of Atlanta. This was accomplished in part during the 1950s and 1960s through government planning, Appendix D at p.12; through the use of barriers, boundaries, buffers and street name changes to direct black residential growth, id., at p.11; and through widespread government blockbusting (actually neighborhood busting) undertaken and encouraged by the Metropolitan Planning Commission, the Westside Mutual Development Committee, and the mayor of Atlanta, id., at pp.12-13.

Second, government officials at all levels discouraged black movement to the suburbs and contained or eliminated the small black enclaves already located there. This was accomplished by condemning black neighborhoods and turning them into white parks, Appendix D at p.14; by closing roads

to isolate suburban black communities, id. at p.14; and by undertaking suburban urban renewal and relocating blacks in the City of Atlanta, id. at p.15.

Finally, government officials at all levels used public housing to "concentrate the black population in the metropolitan area within the City of Atlanta," Appendix D at p.15, by building segregated public housing projects and locating 83% of all public housing units within the City of Atlanta, id. at pp.15-16; by maintaining suburban residence requirements for projects in the suburbs but no residence requirements for housing projects in Atlanta, id. at pp.17-18; and by precluding the construction of public housing in the suburbs through building permit denials and rezoning actions, id. at pp.16-18.

As the district court below observed, metropolitan Atlanta's unassailable "condition of racial separation was caused in part by the intentional acts of government officials." Id. at p.28. If this Court's decision in Milliken I means anything, then the district court's findings of fact necessitate a conclusion of law that extensive interdistrict violations had been committed.

Yet, the district court refused to hold that even a single constitutional violation had been committed. Its dismissal of this case is erroneous as a matter of law.

CONCLUSION

For the reasons stated herein, this Court should dismiss this appeal for want of jurisdiction since the convening of the three-judge court below was not "required" within the meaning of 28 U.S.C. §1253.

In the event that this Court does not dismiss this appeal for want of jurisdiction, this Court should note probable jurisdiction over this appeal.

Dated: February 19, 1980

Respectfully submitted,

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